

No. 15921 ✓

United States
Court of Appeals
for the Ninth Circuit

HYACINTH FLICKINGER, Appellant,

VS.

DONALD McGAVICK, Trustee in Bankruptcy of
the Estate of Hyacinth Flickinger, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Southern Division

FILED

AUG - 4 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the Superior Court of the State of Washington,
in and for the County of Pierce

No. 62579

In the Matter of the Estate of
FREDRICK F. FLICKINGER, Deceased.

ORDER AWARDING TO AND SETTING
OVER TO THE SURVIVING SPOUSE
ALL OF THE PROPERTY OF THE
ABOVE ENTITLED ESTATE

This Matter coming on regularly to be heard in open Court on March 26, 1957, upon the petition of Hyacinth M. Flickinger, the duly appointed, qualified and acting administratrix of the above entitled estate, and who is also the surviving wife of the said Fredrick F. Flickinger, deceased, the said petition being for an Order to award to and set over to her, as the surviving spouse of the said Fredrick F. Flickinger, deceased, all of the property belonging to the estate of the said Fredrick F. Flickinger, deceased, and it appearing to the Court, and the Court finding that due notice of the time and place of the said hearing has been given for the time and in the manner provided by laws of the State of Washington, and by the Order of this Court, and the said petitioner, Hyacinth M. Flickinger, being present in Court, and represented by her attorney, O. O. McLane, and Martha Marie Flickinger, the minor daughter of the said Fredrick F. Flickinger, deceased, and the said Hya-

cinth M. Flickinger, the surviving sponse of the said Fredrick F. Flickinger, deceased, being represented by her Guardian Ad-Litem, Andrew J. Burkhart, and it further appearing to the Court, and the Court finding, that the estate of the said Fredrick F. Flickinger, deceased, consisted solely of the household furniture and furnishings and the home of the said Fredrick F. Flickinger, deceased, and the said petitioner, and it further appearing to the Court that no Homestead has been claimed in the manner provided by law, either prior or subsequent, to the death of the said Fredrick F. Flickinger, deceased, whose estate is being administered in these proceedings, and it also appearing to the Court that the entire estate, including household furniture and furnishings, and the interest of the said estate in the said real property, was the community property of the said Fredrick F. Flickinger, deceased, and Hyacinth M. Flickinger, the petitioner herein, and the entire estate, after the payment of the expenses of last illness of the said deceased, the funeral expenses and the cost of administration, is of the value of less than \$6,000.00, to wit: of the value of \$5807.42, and it also appearing to the satisfaction of the Court, from the filing of receipts herein, that the expenses of last illness and funeral expenses have been paid, and that the cost of administration has been provided for; that the property has been fairly and properly appraised, and that the said estate is not subject to any inheritance tax, either Federal or State.

It Is Therefore Ordered, Adjudged, and Decreed that the entire estate of the said Frederick F. Flickinger, deceased, be and the same is hereby awarded to and set over to Hyacinth M. Flickinger, the surviving wife of the said Frederick F. Flickinger, deceased, free and clear of all claims which have or could be filed against the said estate, and also free and clear of any and all heirs, vesting in her, the said Hyacinth M. Flickinger, absolute title to all property belonging to the said estate, and which is hereinafter described; that no further administration of the said estate be had; that the said estate be closed and the said administratrix be and she is hereby relieved from further liability in the said estate.

That the personal property, which is hereby awarded to and set over to the said Hyacinth M. Flickinger, is as follows: the household furniture and furnishings.

That the real property which is hereby awarded to and set over to the said Hyacinth M. Flickinger, constitutes the home and is located in Pierce County, in the State of Washington, known as No. 10428 Meadow Road, S. W., Tacoma 99, Washington, and is particularly described as follows:

That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by Order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a Portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats, at page 42, records of Pierce County Auditor, lying southerly of a line

described as follows: Commencing at the Northeast corner of Lot 10, in Block 1 of Primley's Replat of a portion of Lake Steilacoom Park: (the North Line of said Lot 10 being an East and West line) Thence South $61^{\circ}09'$ East 28.3 feet to the true point of beginning for said described line; Thence South $64^{\circ}51'$ West 87 feet; Thence North $68^{\circ}09'$ west 47 feet; Thence South $79^{\circ}26'$ West 128 feet more or less to the Westerly boundary of said Block 1.

Done in Open Court this 26th day of March, 1957.

W. A. RICHMOND,
Judge.

Presented by:

O. O. McLANE,
Attorney for said estate.

Filed in Co. Clerk's Office. Pierce Co., Wash.
Mar. 26, 1957. Robt. L. Dykeman, Clerk. By MS,
Dep. RL 107-2-288.

State of Washington,
County of Pierce—ss.

I, Robt. L. Dykeman, County Clerk of Pierce County, and ex-officio Clerk of the Superior Court of the State of Washington, for the County of Pierce, do hereby certify that I have compared the foregoing copy with the original Instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Tacoma this 9th day of October, 1957.

[Seal] ROBT. L. DYKEMAN,
 Clerk,

/s/ By (Illegible),
 Deputy Clerk.

[Endorsed]: Filed October 31, 1957.

United States Court of Appeals
for the Ninth Circuit

No.....

In the Matter of

HYACINTH M. FLICKINGER, Bankrupt.

AGREED STATEMENT OF FACTS

Inasmuch as no oral testimony has been taken in these proceedings throughout, and practically all of the facts are documentary in nature, and since an agreed statement of facts on appeals appears to be favored;

Therefore, pursuant to provisions of Rule 76 of Rules of Civil Procedure, following is a statement of the facts essential to a decision of the questions involved by the Appellate Court, including a copy of each of the orders of the Honorable Judge of the District Court, and a copy of the Notice of Appeal showing its filing date, and copies of such

other papers as are deemed of possible use to the Appellate Court.

Following the death of Fredrick F. Flickinger on November 5th, 1956, leaving surviving, his wife, Hyacinth Flickinger, and minor daughter, Martha Marie Flickinger, open probate of his estate was instituted in the Superior Court of the State of Washington for Pierce County on December 4th, 1956. Notice to Creditors was given by publication on December 7th, 14th and 21st. An Inventory and Appraisement was filed January 3rd, 1957, showing an estate of \$11,500.00, subject to a mortgage balance on home of \$5315.54; funeral expenses of \$427.58; expenses of last illness \$100.00, and expenses of administration of \$250.00, leaving a net estate of \$5807.42.

On March 26, 1957 by an order of the Probate Court, duly given, and made and entered therein, the entire assets of the estate including the home were set over and awarded to the surviving spouse, a copy of which order is hereto attached.

On May 14, 1957, the widow of deceased, Hyacinth M. Flickinger, filed a petition in Bankruptcy, No. 17405. The next day she was adjudicated a bankrupt.

On May 29, 1957, the first meeting of creditors was held; no creditors appeared; the Referee decreed orally the "exemptions to be allowed"; "no Trustee to be appointed," but no formal order appears to have been entered.

On June 4th, 1957 a Trustee was appointed who

qualified; on July 3rd, 1957, an appraiser was appointed by the Trustee; the appraiser made an informal report.

All claims listed or filed in the Bankruptcy Proceedings were pre-existing claims with no mechanics or other liens, as all claims were prior to the death of Fredrick F. Flickinger, deceased, and the claims of Scott, Langhorne & McGavick & Donald H. McGavick was actually served in the probate Proceedings in the state court and then again served and filed in the Bankruptcy Proceedings.

No additional property was acquired, by the bankrupt between the time of the probate proceedings in the state court which was concluded on March 26, 1957 and the Filing of Bankruptcy on May 14, 1957.

On August 19th, 1957, the Trustee filed a report of exempt property, a copy of which is hereto attached.

Based upon the appraiser's report the Trustee petitioned the Referee for authority to sell the identical property described in the order of the state court of March 26, 1957 at private sale "free and clear of all valid liens and encumbrances" and "all liens and encumbrances if any to attach to the net proceeds of such sale."

On August 26th, 1957, the bankrupt filed certain motions and objections, including a copy of the set aside order of the homestead as a probate exemption. Following a hearing upon such motions and objections the Referee made an order "authorizing

the sale of real property at private sale" of the identically described property in the order of the state court of March 26, 1957.

On September 9th, 1957, an order authorizing such sale was made and filed herein, a copy of which is hereto annexed.

On October 3rd, 1957 the bankrupt filed a petition for review, and by a timely application the Referee made an order extending the time for filing her statement of facts pursuant to Rule 6 (B) of the Local Bankruptcy Rules, for ten days, and such statement of facts were duly filed.

For the purpose of review the Referee filed a Certificate of on-review showing summary of the case, the question presented, his conclusion and the paper transmitted for review.

The Trustee submitted his statement of facts, and the bankrupt also submitted a statement of facts and points involved.

Upon notice the matter was argued before the District Judge, the Hon. George H. Boldt, presiding, and order which was erroneously dated February 13, 1957, but later corrected to read December 13, 1957, was entered.

On December 23, 1957 counsel for the bankrupt made a motion for reconsideration of the decision and submitted supplement to "Brief of Bankruptcy," and also a "Brief of Bankruptcy," and Judge Boldt denied the motion, filing an order January 4, 1958.

Thereupon, the bankrupt filed "Notice of Appeal" on January 24, 1958; and on the same date

(January 24, 1958) paid into the Registry of the Court, cash of \$250.00 as and for an Appeal Bond and filed the regular Appeal Bond on January 27, 1958.

By Judge Boldt's orders, both original and subsequent, the action of the Referee was affirmed to the effect that the bankrupt's exempt property was ordered sold notwithstanding the set aside of the Superior Court in probate, and notwithstanding the bankrupt's Declaration of Homestead filed prior to the petition in bankruptcy, a copy of which is attached to the petition in bankruptcy.

/s/ O. O. McLANE,

/s/ J. PETER P. HEALY,

Attorneys for Bankrupt and
Appellant.

/s/ DONALD H. McGAVICK,

Trustee and Attorney for
Respondent.

United States District Court, Western District
of Washington, Southern Division

In Bankruptcy—No. 17405

In the Matter of

HYACINTH FLICKINGER,

Bankrupt.

ORDER

The question presented to this court on review of proceedings had before the referee in bankruptcy

is the propriety of an order of the referee dated September 25, 1957 authorizing sale of certain real property in which the bankrupt claims a homestead exemption.

Hyacinth Flickinger was adjudicated a bankrupt on May 15, 1957 pursuant to a voluntary petition filed by her May 14, 1957. Prior thereto, on March 26, 1957, the Honorable W. A. Richmond, Judge of the Superior Court of the State of Washington for Pierce County, in probate cause No. 62579 had awarded the subject real property to the bankrupt in lieu of homestead in connection with the probate of her husband's estate. Shortly thereafter and prior to the proceedings now on review, the bankrupt declared a homestead in the subject property in accordance with Chapter 6.12 of the Revised Code of Washington. At the first meeting of creditors in the bankruptcy proceedings the bankrupt testified that her equity in the property was of the value of \$4,800. Thereafter at the request of a creditor alleging that the bankrupt's equity in such property was in fact of a value substantially in excess of the \$6,000 homestead exemption established by Washington law, a trustee was appointed on June 4, 1957. On August 18, 1957 an appraisal of the property by a court appointed appraiser revealed that the market value of the subject real property as of that date was substantially in excess of bankrupt's \$6,000 exemption and all liens and encumbrances. Following a hearing held before the referee on September 12, 1957, at which time it was

agreed by all parties that the property is indivisible, the referee authorized sale by the trustee of the entire property saving to the bankrupt her right to an award of \$6,000 cash in lieu of her homestead exemption. This review follows.

The Bankruptcy Act, Sec. 70(a) (11 U.S.C.A. 110(a)) vests the trustee in bankruptcy as of the date of filing of the petition with title to all property of the bankrupt except that which is held to be exempt. Sec. 70(c) (11 U.S.C.A. 110(c)) gives the trustee all the rights, remedies and powers of a creditor (whether or not such creditor actually exists) as to all property upon which such hypothetical creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of adjudication of bankruptcy. The law of the State of Washington limits the value of the homestead exemption to \$6,000. R.C.W. 12.050. Provision is made in R.C.W. 6.12.140 et seq. for proceedings in the state courts by a judgment creditor to contest the value of a homestead and obtain execution for enforcement of a judgment against the proceeds from sale of that portion of the debtor's property which is in excess of the \$6,000 limit. R.C.W. 6.12.230 requires the sale of the entire property if it appears from the report of appraisers that the land claimed as a homestead by the debtor exceeds in value the amount of homestead exemption and that it is indivisible. R.C.W. 6.12.260 gives the debtor the same protection against legal process with respect to the money received from

the proceeds of such sale as she would have had in the homestead property itself.

From the foregoing it is clear that under Washington law a creditor of the bankrupt could have obtained a lien in the subject property by legal or equitable proceedings at the time of adjudication of bankruptcy. Under the rule recently laid down in this circuit in *England v. Sanderson*, 236 F.2d 641 (9 Cir. 1956) in such a situation a general creditor of the bankrupt need not seek his relief in the state courts but may proceed in the bankruptcy court because title to all of the bankrupt's real property which is in excess of the \$6,000 homestead exemption is vested in the trustee in bankruptcy by operation of law as of the date of adjudication of bankruptcy. 11 U.S.C.A. 110(a) and (c). The cases to the contrary cited by counsel for the bankrupt are all clearly distinguishable under the reasoning of the Court of Appeals for the Ninth Circuit in the *England* case, *supra*.

The contention raised by counsel for the bankrupt that the order of the Superior Court for the State of Washington for Pierce County in probate cause No. 62579 fixing the value of the property here in question as of March 26, 1957 at \$5,807.42 is *res judicata* as to the value of such property at the later date of bankruptcy adjudication obviously is without merit.

The order of the referee dated September 28, 1957 authorizing the sale of the real property of the bankrupt on the terms and conditions therein stated

is proper in every respect and must be affirmed.
It Is So Ordered.

Dated this 13th day of February, 1957.

GEO. H. BOLDT,
U. S. District Judge.

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION
OF DECISION

Comes now Hyacinth M. Flickinger, the above named bankrupt, by and through her attorneys, J. Peter P. Healy and O. O. McLane, and respectfully moves this honorable Court to reconsider its recent Order in the above entitled cause, which Order is erroneously dated the 13th day of February, 1957, but apparently was intended for the 13th day of December, 1957.

This Motion is based upon the records and files herein and upon the Briefs hereto attached, each of said two Briefs having been prepared separately and individually by the two different attorneys and which the greater part thereof, covers different points.

J. PETER P. HEALY,
O. O. McLANE,
Attorneys for Hyacinth M.
Flickinger, Bankrupt.

[Title of District Court and Cause.]

ORDER

Motion by the bankrupt for reconsideration of the order of this court filed December 16, 1957 has been fully considered in the light of the briefs filed in support thereof. Nothing appearing either in the motion or the briefs requires modification or reversal of the order above referred to. Moreover, that decision was reached without regard to possible questions of fraud or inadequacy of notice in the state court proceedings under the ruling of the Supreme Court of the United States in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 either of which might well be urged as additional grounds for adhering to this court's previous ruling. Accordingly, it is hereby

Ordered that the motion for reconsideration be and the same hereby is denied.

It Is Further Ordered that, pursuant to Rule 60(a) F.R.Civ.P., the clerical error appearing on page 3, line 24 of the order of this court previously filed herein December 16, 1957 is hereby corrected by deleting said line and substituting therefor the following: "Dated this 13th day of December, 1957." Interlineation to such effect has been made and initialed by the court.

Dated this 2nd day of January, 1958.

GEO. H. BOLDT,
U. S. District Judge.

In the District Court of the United States, Western
District of Washington, Southern Division

In Bankruptcy—No. 17405

In the Matter of

HYACINTH FLICKINGER, Bankrupt.

NOTICE OF APPEAL

Comes now the bankrupt, Hyacinth Flickinger, by and through her attorneys of record, O. O. McLane and J. Peter P. Healy, and appeal to the Ninth Court of Appeals of the United States from the Order of the United States District Court for the Western District of Washington, Southern Division, in this cause, and the Honorable George H. Boldt, Judge thereof presiding, filed in said District Court on December 16th, 1957, affirming the order of the Referee in Bankruptcy of September 28th, 1957, authorizing and directing the sale of the bankrupt's homestead, regularly claimed under the State Statute prior to bankruptcy, and also duly awarded to her the said bankrupt by an order of the State Probate Court in lieu of homestead under the provisions of the State Law, valued at over \$5800.00, all prior to the bankruptcy proceedings.

This appeal is based upon and also runs from the order of the said District Court and the said Judge Boldt, dated January 2nd, 1958, and filed in the office of the Clerk on January 2nd, 1958, deny-

ing the bankrupt's motion for reconsideration of the court's order filed December 16th, 1957, as aforesaid, and giving additional grounds therein, and correcting error in the original order.

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131; 57 S. Ct. 382; 81 L. ed 557.

Dated this 24th day of January, 1958.

O. O. McLANE,
J. PETER P. HEALY,
Attorneys for Bankrupt, Hyacinth M. Flickinger.

MEMORANDUM OF LEGAL PUBLICATION

O. O. McLane, Attorney
918 Puget Sound Bank Bldg.

No. 62579—Notice to Creditors

In the Superior Court of the State of Washington in and for the County of Pierce.

In the Matter of the Estate of Fredrick F. Flickinger, Deceased.

Notice is hereby given that the undersigned has been appointed and has qualified as administratrix of the estate of Fredrick F. Flickinger, Deceased; that all persons having claims against said deceased are hereby required to serve the same, duly verified, on said administratrix or her attorney of record at the address below stated, and file the same with the Clerk of said Court, together with proof of such service, within six months after the date of

first publication of this notice or the same will be barred.

Date of first publication December 7, 1956.

HYACINTH M. FLICKINGER,
Administratrix of said Estate, 10428 Meadow Road,
Tacoma 99, Washington.

O. O. McLANE,
Attorney for Estate, 918-20 Puget Sound Bank
Bldg., Tacoma 2, Washington.

Dec. 7, 14, 21.

In the Superior Court of the State of Washington,
for the County of Pierce

No. 62579

In the Matter of the Estate of
FREDRICK F. FLICKINGER, Deceased.

INVENTORY AND APPRAISEMENT

State of Washington,
County of Pierce—ss.

Hyacinth M. Flickinger, administratrix of the above entitled estate being first duly sworn on her oath, says that the within is a true inventory of all the estate, real, personal and mixed, of said decedent coming into her hands.

Subscribed and sworn to before me this 4th day of December, 1956.

O. O. McLANE,
Notary Public in and for the State of Washington,
residing at Tacoma, Washington.

State of Washington,
County of Pierce—ss.

Lydia Quinn, appointed by Inheritance Tax Department D. A. Canale and George Christensen, duly appointed appraisers of the above entitled estate, being duly sworn, each for himself says:

I will honestly and impartially appraise the property of said estate, which shall be exhibited to me, according to the best of my knowledge and ability.

LYDIA QUINN,
D. A. CANALE,
GEORGE CHRISTENSEN.

Subscribed and sworn to before me this 3rd day of January, 1957.

O. O. McLANE,
Notary Public in and for the State of Washington,
residing at Tacoma, Washington.

Inventory of Property of Said Estate: Household furniture & furnishings,

Appraised Values: Personal Property: \$400.00.

Inventory of Property of Said Estate: Land, Assessed Valuation: Real Estate \$275.00. Improvements: \$2155.00. Appraised Values: Real Property \$11,500.00, Mortgage \$5315.00, Net \$6185.00.

The home described as: That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by Order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats,

at page 42, records of Pierce County Auditor, lying Southerly of a line described as follows: Commencing at the Northeast corner of Lot 10, in Block 1 of Primley's Replat of a Portion of Lake Steilacoom Park: (The North line of said Lot 10 being on East and West line) thence South $61^{\circ}09'$ East 28.3 feet to the true point of beginning for said described line; thence South $64^{\circ}51'$ West 87 feet; thence North $68^{\circ}09'$ West 47 feet; thence South $79^{\circ}26'$ West 128 feet more or less to the Westerly boundary of said Block 1. Subject to mortgage in favor of Olympia Federal Savings and Loan Association, upon which there was unpaid on November 5, 1956, \$5315.54.

Total Assessed Valuation of Real Estate, \$275.00.

Total Assessed Valuation of Improvements, \$2155.00.

Total Appraised Valuation of Personal Estate, \$400.00.

Total Appraised Valuation of Real Estate, \$6185.00.

Total Appraised Valuation of Estate, \$6585.00.

Community Interest, \$3,292.50.

We, the undersigned appraisers, do hereby certify that we have appraised the property described in the above inventory at \$6585.00, the fair value thereof.

Dated this 3rd day of January, 1957.

LYDIA QUINN,
D. A. CANALE,
GEORGE CHRISTENSEN.

In the District Court of the United States, Western
District of Washington, Southern Division

No. 17405

In the Matter of

HYACINTH M. FLICKINGER, Bankrupt.

NOTICE

Attached hereto is the legal description of the real property contained in the above-named bankrupt's estate, which is subject to the Trustee's administration. The Trustee does not warrant or guarantee the condition of the home situated thereon, and in lieu thereof, opportunity is offered for an inspection prior to sale. The sale will be made "as is" and "where is." All bidders are urged to avail themselves of the opportunity to inspect the property and become acquainted with the precise identity and condition thereof. No rebate or adjustment can be made after bid is accepted.

DONALD H. McGAVICK,
Trustee of above Bankrupt.

Real property located at No. 10428 Meadow Road, SW, Tacoma 9, Washington, more particularly described as follows:

That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats, at page 42, records of

Pierce County Auditor, lying southerly of a line described as follows: Commencing at the Northeast corner of Lot 10 in Block 1 of Primley's Replat of a portion of Lake Steilacoom Park: (The North line of said Lot 10 being an East and West line); Thence South $61^{\circ}09'$ East 28.3 feet to the true point of beginning for said described line; thence South $64^{\circ}51'$ West 87 feet; thence North $68^{\circ}09'$ West 47 feet; thence South $79^{\circ} 26'$ West 128 feet more or less to the Westerly boundary of said Block 1,

together with the home improvements situated thereon.

The above property has been appraised at the value of \$15,000, subject to a mortgage of \$5,200 and a declaration of homestead of \$4,800, for a net of \$5,000.

GEORGE L. MARK,
George L. Mark,
Appraiser.

[Title of District Court and Cause.]

TRUSTEE'S REPORT OF EXEMPT PROPERTY

To....., Referee in Bankruptcy.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him

in his schedules filed in the above entitled proceeding.

General Head: * * * Revised Code of Washington 6.12.010 et seq. Particular Description: Real Property situated in Pierce County, State of Washington, to wit: (See description attached). Declaration of homestead filed in Pierce County Auditor's Office, under fee #1787113. Estimated Value: \$4800.00

General Head: Revised Code of Washington 6.16.010 et seq. Particular Description and Estimated Value: Cash on Hand \$3.50. Household furniture and furnishings \$400.00. Wearing apparel \$100.00. 1950 Chevrolet Automobile \$80.00.

Dated this 19th day of August, 1957.

DONALD H. McGAVICK,
Trustee.

Filed August 18, 1957.

[Title of District Court and Cause.]

PETITION OF REVIEW

To the Honorable George H. Boldt, Judge of the United States District Court, Western District of Washington, Southern Division:—

Comes now Hyacinth Flickinger, by and with the assistance of her attorneys, O. O. McLane and J. Peter P. Healy, and petitions this Honorable Court for a review of the proceedings, and particularly in order of the Honorable O. M. Pitzen, Referee in Bankruptcy within this District of Ta-

coma, in which the said Referee entered an order on or about the 24th day of September, 1957, authorizing the Trustee in Bankruptcy herein to sell certain real property alleged to belong to the bankrupt estate, copy of which order is hereto attached, marked Exhibit "A", and hereby referred to and by this reference hereby made a part of this petition.

The jurisdiction of this court is invoked under the provisions of the United States Bankruptcy Law, pursuant to Chapter 11, U. S. C. A.

This petition shows that the bankrupt is a widow since November 5th, 1956, the estate of her late husband, Fredrick M. Flickinger, being probated in the State of Washington for Pierce County, in Cause No. 62579.

In said probate proceedings the home of the bankrupt was appraised by three disinterested appraisers appointed by the probate court at the sum of \$6,185.00, over and above mortgage encumbrances thereon, with an unpaid balance at that time of \$5,315.00. Later on and on or about the 14th day of May, 1957, she filed her homestead declaration on all of the property described in Exhibit "A" hereto attached; a copy of said homestead declaration is attached to the petition and schedules in bankruptcy.

That on the 29th day of May, 1957, the first meeting of creditors was held, and the Referee then and there decided and declared orally that the exemptions would be allowed, and no Trustee would be appointed.

That on the 19th day of August, 1957, the Trustee made a report of exempt property, “* * * and set apart to be retained by the bankrupt aforesaid as his own property * * *”, and included the home property described in the declaration of homestead and personal property.

That theretofore at the suggestion of one or two general creditors without liens, a Trustee was appointed and qualified; the Trustee applied for and obtained from the Referee the appointment of one appraiser, who is reported to have viewed the property from the outside and reported that he could sell it for \$15,000.00. The same property had been appraised in probate on the 3rd day of May, 1957, by three appraisers appointed by the Superior Court in Probate at \$11,500.00, of which \$5350.00 represented the unpaid balance on mortgage liens, and after the expenses of funeral and the probate expenses were deducted, the balance was set aside to the widow, the bankrupt herein, and the probate homesteaded and declared exempt from the claims of all creditors of said deceased, all of which happened and occurred prior to the filing of the petition and schedules in bankruptcy herein.

That following the report of the single appraiser in the bankruptcy proceedings, to and through the Trustee for the referee, the latter made the order, Exhibit “A”, over the objections of the bankrupt through her counsel on the grounds of the exemptions claimed by the bankrupt by declaration, and allowed by the Superior Court in probate, all prior to the proceedings in bankruptcy; that said objec-

tions were heard upon notice before the Referee and overruled, and by the order, Exhibit "A", of the Referee the proceeds of the sale were ordered deposited in the bank "for the benefit of the creditors."

The bankrupt with the assistance and advice of her counsel herein, believes that the order of sale is erroneous; that the exemptions of the bankrupt should have been allowed, and the trustee should have set apart to the bankrupt her home as exempt as is required of him by the bankruptcy law, even though under proceedings in the State court or courts the property might have been, though not certainly, subjected to sale and to the provisions of Chapter 6.12 of the Revised Code of Washington, by lien creditors holding liens prior to the initiation of the bankruptcy proceedings herein.

That, by virtue of the State law the validity of a homestead exemption must be contested in a court of general jurisdiction: RCW 6.12.090. Petitioner is advised and believes, and therefore alleges, that where the State court has decreed a homestead exemption in proper proceedings such as probate, prior to the bankruptcy court taking jurisdiction, that the homestead exemption is a matter of res judicata, and may not be upset by orders of the bankruptcy court.

Wherefore, the bankrupt prays that this Honorable Court will review the proceedings had, taken and made before the Referee, and upon the completion of the review to order the exemptions of the bankrupt allowed, and the property set over to her

as exempt so far as the bankruptcy proceedings are concerned; and for her costs in this proceedings, and for such other and further relief as may be proper in the premises.

HYACINTH FLICKINGER,
Petitioner.

Duly Verified.

[Title of District Court and Cause.]

ORDER AUTHORIZING SALE OF REAL
PROPERTY AT PRIVATE SALE

This matter having come on for hearing the 12th day of September, 1957, upon the petition of the Trustee of the above named bankrupt's estate to sell the real property of said estate at private sale; the Trustee, Donald H. McGavick, appearing in person, and the said bankrupt appearing by and through her attorneys, O. O. McLane and J. Peter P. Healy; the court having examined the records and files herein and having heard oral argument of the attorneys for the said bankrupt; and being fully advised in the premises:

Now Therefore, the Court advises and determines that it is in the best interests of the bankrupt estate that the real property be sold at private sale for the benefit of the creditors, and the said bankrupt is hereby instructed to cooperate fully with the Trustee in facilitating the sale, and if she fails so to do she shall face possible removal from the premises:

It Is Ordered, Adjudged and Decreed, That the Trustee be and he hereby is authorized to sell the real property of the bankrupt's estate, situate in the County of Pierce, State of Washington, and more particularly described as follows, to wit:

Real property located at No. 10428 Meadow Road, S. W., Tacoma 99, Washington, to wit:

That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats, at Page 42, records of Pierce County Auditor, lying southerly of a line described as follows: Commencing at the Northeast corner of Lot 10 in Block 1 of Primley's Replat of a portion of Lake Steilacoom Park: (The North line of said Lot 10 being an East and West Line); thence South $61^{\circ}09'$ East 28.3 feet to the true point of beginning for said described line; thence South $64^{\circ}51'$ West 87 feet; thence North $68^{\circ}09'$ West 47 feet; thence South $79^{\circ}26'$ West 128 feet more or less to the Westerly boundary of said Block 1;

together with the home improvement situated thereon, at private sale after notifying as many interested parties as is reasonably possible so to do; that the property shall pass free and clear of all valid liens and incumbrances, and all such liens and incumbrances, if any, shall attach to the net proceeds of such sale, and that the proceeds realized from the said sale shall be deposited in the Trus-

tee's account at the National Bank of Washington, Tacoma, Washington, for the benefit of creditors.

Done in Open Court, this 24th day of September, 1957.

O. M. PITZEN,

Referee in Bankruptcy.

Presented by:

DONALD H. McGAVICK.

Acknowledgment of Service Attached.

DECLARATION OF HOMESTEAD

Know All Men By These Presents: That I, Hyacinth M. Flickinger, do hereby declare the property hereinafter described as a "Homestead", and in support of such declaration state as follows:

I.

That I am a widow but am the head of a family consisting of myself, Hyacinth M. Flickinger, and my minor daughter, Martha Marie Flickinger, who is now fifteen (15) years of age and is supported and provided for by myself.

II.

That I, with my said minor daughter, Martha Marie Flickinger, reside on the premises hereinafter described and intend to continue to reside thereon, and do hereby claim the same as a "Homestead."

III.

That the said premises are situated in Pierce County, in the State of Washington, in the district

known as Lakewood Center, and is known as No. 10428 Meadow Road, S.W., Tacoma 99, Washington, and are particularly described as follows:

That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by Order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a Portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats, at page 42, records of Pierce County Auditor, lying southerly of a line described as follows: Commencing at the Northeast corner of Lot 10, in Block 1 of Primley's Replat of a portion of Lake Steilacoom Park: (The North Line of said Lot 10 being an East and West line); Thence South $61^{\circ}09'$ East 29.3 feet to the true point of beginning for said described line; Thence South $64^{\circ}51'$ West 87 feet; Thence North $68^{\circ}09'$ West 47 feet; Thence South $79^{\circ}26'$ West 128 feet more or less to the Westerly boundary of said Block 1.

IV.

That the said premises hereinabove described are my separate property.

That the said premises are of the actual cash value of not to exceed \$10,000.00. That the said premises are subject to a certain real estate mortgage in favor of The Olympia Federal Savings and Loan Association, of Olympia, Washington, upon which mortgage there is unpaid the sum of \$5,200.00, so that the interest in and to the said

property of the said Hyacinth M. Flickinger is in the sum of \$4800.00.

Dated at Tacoma, Washington, this 7th day of May, 1957.

HYACINTH M. FLICKINGER,
Testatrix.

State of Washington,
County of Pierce—ss.

I, O. O. McLane, a Notary Public in and for the said State, do hereby certify that on this 7th day of May, 1957, personally appeared before me Hyacinth M. Flickinger, to me known to be the individual described in and who executed the above and foregoing "Declaration of Homestead", and acknowledged that she signed and sealed the same as her free and voluntary act and deed for the uses and purposes therein mentioned, and on oath stated that the facts therein set forth are true and correct.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

O. O. McLANE,

Notary Public in and for the State of Washington,
residing therein at Tacoma, Washington.

Filed for Record May 14, 1957, 10:41 a.m.
Request of Jack W. Sonntag, Pierce Co. Auditor.

[Endorsed]: No. 15921. United States Court of Appeals for the Ninth Circuit. Hyacinth Flickinger, Appellant, vs. Donald McGavick, Trustee in Bankruptcy of the Estate of Hyacinth Flickinger, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: March 4, 1958.

Docketed: March 8, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15921

In the Matter of

HYACINTH M. FLICKINGER, Bankrupt.

STATEMENT OF POINTS

Pursuant to Subdivision 6, of Rule 17, of the Rules of the above Court, the appellant submits, respectfully, the following Statement of Points, alleged to be errors of law committed by the District Court herein, upon which she intends to rely, upon this appeal; and a designation of the Record, deemed material to the consideration of the appeal, to wit:

First

Homestead exemptions are governed by the provisions of State law, to wit: Statutes, and Decisions of the Highest Court of the State of Bankrupt's domicil, relating thereto. The Bankruptcy Act contains no provision for the claim of Homestead Exemption. The State law creates the exemption and governs its nature, value, and extent; and in this case, contains the only provision for contesting the same. The District Court based its original decision of December 13, 1957, upon the following:

The Bankruptcy Act, Sec. 70 (c) (11 USCA 110 6).

England vs. Sanderson, 236 Fed. 2d 641 (9th Circuit).

Second

It is the policy of the law to apply liberal construction to claims of Homestead Exemption. That policy is not discernible in the holding of the District Court.

Third

An award by the probate court of an homestead to a surviving spouse, regularly made, prior to filing of a petition in bankruptcy, in res judicata in the subsequent bankruptcy proceedings. The District Court ignored this rule.

Fourth

Our Rule 41, effective January 3, 1955, still obtaining, of Pleading, Practice and Procedure, requires notice to known heirs and distributees, of the pendency of probate proceedings, within twenty days of appointment of Executor or administrator.

Respondent herein had notice and filed creditor's claim in both probate, and in Bankruptcy proceedings.

Fifth

This bankrupt filed her Declaration of Homestead pursuant to RCW 6.12.060, prior to any proceedings in Bankruptcy. That exemption is presumed to be valid to the extent of all lands claimed exempt, until contested in a court of general jurisdiction, in the county where situated. RCW 6.12.090.

No contest was filed in any Court.

Sixth

The Superior Court of the State of Washington for Pierce County, wherein this homestead is situated, is a court of general jurisdiction.

All Federal Courts, including Bankruptcy, are Courts of special or limited jurisdiction.

An homestead contest of its validity can take place only in the State Court, and not in any Federal Court.

Seventh

At the first meeting of creditors in Bankruptcy, on May 29, 1957, the Referee orally announced that "exemptions to be allowed", and "no trustee to be appointed."

On August 19, 1957, the Trustee (later appointed and qualified) filed a Report of Exempt Property. (See Record.) It contained this language: "The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as

his own property, under the provisions of the Act of Congress relating to Bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above entitled proceeding.” (Description attached.)

Is not the Bankruptcy Court bound by this record?

Eighth

In view of the facts in divisions Third, Fourth, Fifth, Sixth, and Seventh, above, the District Court’s reference to the case of

Mullane vs. Central Hanover Bank & Trust Co., 239 U. S. 306, 70 S. St. 652, referred to in his decision of January 2, 1958, has no pertinent effect upon the final decision in this case.

Ninth

Is an Order of the Superior Court made and entered after proper notice, in State Court Probate Proceedings six weeks prior to Bankruptcy, declaring the home of the Bankrupt exempt from all claims filed or which could have been filed, in said Probate Proceedings, binding in Bankruptcy, where claims were unliquidated, unsecured and no lien existed, where all claims filed or listed in Bankruptcy Proceedings were ante-dated and were pre-existing as to the said Probate Proceedings.

Appellant Bankrupt says “Yes”. District Court says “No”.

Tenth

Is a “Declaration of Homestead” filed prior to Bankruptcy, conclusive in Bankruptcy where same was not contested as provided by State laws, RCW

Sec. 6.12.090 and RCW Sec. 6.12.140, and the only evidence as to the value was an ordinary letter signed by a real estate broker stating "He believed he could sell the homestead for \$15,000.00", but failed to state upon what terms, where there was a mortgage of \$5,400.00 and homesteader was entitled to exemption of \$6,000.00. RCW Sec. 6.12.050.

Neterer, J., in 6 Fed. Supp. 109 says "Yes". The District Court says "No".

Respectfully submitted,

O. O. McLANE,
J. PETER P. HEALY,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1958. Paul P. O'Brien, Clerk.

